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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

DA 95 - 1784

In the Matter of)	
)	
AT&T Contract Tariff No. 374)	Transmittal Nos. CT 2952 and
)	CT 3441
)	
)	CC Docket No. 95-133
)	

Direct Case Due: August 25, 1995
Oppositions Due: September 8, 1995
Reply Due: September 15, 1995

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: August 11, 1995; Released: August 11, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order, the Common Carrier Bureau (Bureau) designates issues in an investigation of AT&T's proposed modifications to Contract Tariff No. 374¹ as contained in Transmittal Nos. 2952 and 3441 and their relationship to the contract between AT&T Corporation (AT&T) and The Furst Group (TFG) that formed the basis for Contract Tariff No. 374. The Bureau, in the May 1995 order initiating this investigation, suspended the transmittals for five months.²

¹ This contract tariff applies to AT&T Software Defined Network (SDN) Services and AT&T 800 Services consisting of: AT&T MEGACOM 800, Service-Domestic and AT&T 800 READYLINE-Domestic (READYLINE) for interstate or foreign communications.

² AT&T Communications Contract Tariff No. 374, Order, DA 95-1061 (Com. Car. Bur. May 10, 1995) (*Suspension Order*).

II. BACKGROUND

A. CONTRACT TARIFF NO. 374

2. On August 6, 1993, TFG and AT&T entered into a contract that sets forth the terms and conditions purportedly governing the services and rates provided pursuant to AT&T's Contract Tariff No. 374, which became effective on August 20, 1993.³ On July 11, 1994, TFG filed a formal complaint against AT&T seeking certain relief on the grounds that AT&T allegedly had breached material terms of its agreement with TFG,⁴ thereby, TFG argues, violating Section 201(b) of the Communications Act of 1934, as amended (Act).⁵ On January 11, 1995, AT&T filed Transmittal No. CT 2952, which proposes to modify the contract price, volume discount, and availability sections of Contract Tariff No. 374. On January 17, 1995, TFG and Public Service Enterprises, Inc. (PSE) filed petitions to reject or suspend Transmittal No. CT 2952⁶ and AT&T replied.⁷ On April 26, 1995, AT&T filed Transmittal No. CT 3441 to revise the changes made in its earlier Transmittal No. CT 2952. On May 2, 1995, TFG filed a petition⁸ to reject or suspend AT&T's Transmittal No. CT 3441. On May 5, 1995, AT&T filed reply comments.⁹ Transmittal

³ A "contract tariff" is initiated by a contract between a carrier and an initial customer. The underlying contract is generally considered proprietary between the two parties, but the carrier is required to file a contract tariff with the Commission that contains a description of the material terms and conditions of the offering. Carriers make the contract tariff generally available to similarly situated customers for a period of no less than 90 days. See *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880 (1991) and Section 61.55 of the Commission's rules, 47 C.F.R. § 61.55.

⁴ The arguments in both TFG's petition and AT&T's reply relating to the contract between those parties were submitted under requests for confidentiality. Both parties consider information about this contract to be proprietary.

⁵ 47 U.S.C. § 201(b).

⁶ TFG's Petition to Reject or, in the Alternative, to Suspend AT&T Contract Tariff Transmittal No. CT 2952 (filed Jan. 17, 1995) (TFG Petition (CT 2952)).

⁷ Reply of AT&T Corp. (filed Jan. 20, 1995) (AT&T Reply (Tr. CT 2952)).

⁸ TFG's Petition to Reject or, in the Alternative, Suspend AT&T Contract Tariff Transmittal No. CT 3441 (filed May 2, 1995) (TFG Petition (CT 3441)).

⁹ Reply of AT&T Corp. (filed May 5, 1995) (AT&T Reply (Tr. CT 3441)).

Nos. CT 2952 and CT 3441 were both scheduled to take effect on May 11, 1995, but were suspended by a Bureau order issued on May 10, 1995.¹⁰

B. TRANSMITTAL NO. CT 2952

3. In its petition to reject or suspend Transmittal No. CT 2952, TFG claims that AT&T failed to obtain its prior consent to modify Contract Tariff No. 374's terms and conditions as proposed in Transmittal No. CT 2952. TFG complains that the transmittal would adversely affect it by, among other things, increasing the volume thresholds required for discounts on international calls.¹¹ TFG also alleges that the revisions in the transmittal would alter Contract Tariff No. 374 so that it would be inconsistent with material terms of the contract between TFG and AT&T.¹² Alleged differences between contract requirements and AT&T's performance under the contract are also issues in a pending formal complaint against AT&T, File No. E 94-72, which alleges that AT&T has violated the Communications Act in connection with its provision of Contract Tariff No. 374 services to TFG.

4. PSE contends that Transmittal No. CT 2952 would violate both Section 202 of the Act¹³ as well as the Commission's policies concerning contract tariffs because the proposed revisions unreasonably restrict the general availability of preferential rates offered in Contract Tariff No. 374. Specifically, PSE argues that the revisions to the contract tariff would give the original customer immediate rate stability¹⁴ while new customers would

¹⁰ See *Suspension Order*

¹¹ TFG's Petition (Tr. CT 2952) at 3. See also AT&T's Transmittal No. CT 2952, Section 5.B.1., modifying Contract Tariff No. 374. The modifications contained in Transmittal No. CT 2952 would increase volume requirements for some SDN international services by 3.3 percent in order for customers to qualify for new increased discounts. These new increased discounts for international traffic would take effect during the 18th through the 36th months of the customer's contract tariff term. Thus, these rates are simultaneously affected by two countervailing changes. First, the proposed revisions increase the amount of traffic necessary for a customer to qualify for the next level of discounts. Second, the proposed revisions provide a larger discount for a particular level of traffic.

¹² TFG Petition (Tr. CT 2952) at 3.

¹³ 47 U.S.C. § 202.

¹⁴ Contract Tariff No. 374 incorporates by reference AT&T's generally tariffed rates for two services provided under this contract tariff, the SDN and READYLINE Services. The contract tariff then discounts those general rates by specified percentages. Transmittal Nos. CT 2952 and 3441 would amend the tariff to provide "rate stability" by increasing these contract tariff discounts under certain circumstances. Specifically, the transmittals provide that, if during any one of several specified six-month periods, AT&T's generally tariffed after-discount rates for SDN and READYLINE services increase by more than

have to wait eighteen months before obtaining rate stability.¹⁵ PSE further asserts that rate stability for the full term is available only to a customer "prescient enough to have obtained CT 374 a year and a half ago, when the offering in its tarified form had no rate stability."¹⁶

5. AT&T replies that neither the tariff nor the contract guarantees TFG a veto over all tariff changes.¹⁷ AT&T states that Transmittal No. CT 2952 is designed to increase the discount percentage rates offered to TFG under Contract Tariff No. 374 in order to offset increases in AT&T's general tariff rates that form the basis for the non-discounted base rates in Contract Tariff No. 374. With regard to the proposed increases in the thresholds for international services, AT&T argues that the larger proposed discounts associated with each of those volume levels would more than offset the increases in the thresholds. AT&T states that, taken as a whole, the filing restores the effective "bottom line" for Software Defined Network (SDN) and READYLINE services as of the original filing date of the tariff.¹⁸ In response to PSE, AT&T asserts that under Contract Tariff No. 374, as amended by Transmittal No. CT 2952, all provisions apply to all customers of the revised contract tariff. AT&T further claims that if PSE wanted the same terms that TFG obtained, it could have taken service under this contract tariff during the initial availability window when TFG obtained service.¹⁹ Moreover, AT&T argues that customers are clearly better off under the revisions proposed in Transmittal No. CT 2952 than they were under Contract Tariff No. 374 as initially filed.²⁰

one percent, the contract tariff discounts applicable to those services shall be raised to reverse the effect of these rate increases. See Transmittal Nos. CT 2952 and CT 3441 at Section 4.

¹⁵ PSE Petition at 3.

¹⁶ *Id.* at 5.

¹⁷ AT&T Reply (Tr. CT 2952) at 2.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 6.

C. Transmittal No. CT 3441

6. AT&T's Transmittal No. CT 3441 would remove the Transmittal No. CT 2952 provision that would terminate rate stability after February 20, 1997.²¹ TFG argues that AT&T failed to notify TFG of the changes proposed in Transmittal No. CT 3441, and did not obtain its consent to those revisions.²² Additionally, TFG asserts that the revisions in this transmittal would materially and adversely affect a number of TFG's rights under Contract Tariff No. 374 and the contract on which that contract tariff was based.²³ AT&T replies that Transmittal No. CT 3441 implements changes, suggested by the Commission, that would limit the benefits of the filing to TFG and avoid retroactive ratemaking.²⁴

III. DESIGNATION OF ISSUES

7. We designate the following issues in the investigation of Transmittal Nos. CT 2952 and CT 3441.

Issue I: Is AT&T required to satisfy the "substantial cause" doctrine before one or more of the tariff revisions proposed in Transmittal Nos. CT 2952 and CT 3441 become effective?

Issue II: If the resolution of Issue I is in the affirmative, has AT&T shown substantial cause to make the revisions to Contract Tariff No. 374 proposed in Transmittal Nos. CT 2952 and CT 3441?

8. AT&T made no substantial cause showing in support of either Transmittal No. CT 2952 or CT 3441. In its direct case, AT&T, at a minimum, should address the

²¹ This revision rendered one of PSE's arguments moot. PSE had argued that the existence of the February 20, 1997 cutoff date limited it and other new customers to, at most, seven and a half months of rate stability while the original customer enjoyed a full eighteen months of rate stability. PSE argued that this was discrimination in violation of Section 202 of the Communications Act, 47 U.S.C. § 202. *See* PSE Petition at 4. The removal of this cutoff date, however, would eliminate this disparity. *See* Contract Tariff No. 374, Transmittal No. CT 3441 at Section 4.

²² TFG Petition (Tr. CT 3441) at 3.

²³ *Id.* at 2 and 4.

²⁴ AT&T Reply (Tr. CT 3441) at 5.

applicability of the substantial cause doctrine²⁵ to the provisions in Transmittal Nos. CT 2952 and CT 3441 that require AT&T to file tariff revisions to offset any rate increases that exceed one percent in specified six-month periods²⁶ and the changes in the threshold amounts and discount percentages for international traffic.²⁷ AT&T may present arguments about why the substantial cause doctrine is not applicable in this instance. Assuming that substantial cause does govern this proceeding, AT&T should discuss the specific "commercial contract principles," if any, that are applicable to an analysis of the lawfulness of these transmittals, how such commercial contract principles should be applied to the revisions in Contract Tariff No. 374 (taking into account the non-tariffed contract between AT&T and TFG) and the impact of applying those principles in this instance. AT&T also may address the legal relevance of the non-tariffed contract with TFG to a "substantial cause" analysis predicated upon commercial contract principles. AT&T may also adduce factual arguments to demonstrate that proposed revisions satisfy the "substantial cause" standard.

IV. PROCEDURAL MATTERS

A. Filing Schedules

9. This investigation, to be identified as CC Docket No. 95-XXX, will be conducted as a notice and comment proceeding during which AT&T bears the burden of proof to show substantial cause for the suspended modifications to Contract Tariff No. 374.²⁸ AT&T is designated as a party to this proceeding and shall file its direct case no later than 14 days after the release of this Order. The direct case must present the party's position with respect to the issues described in this Order. Pleadings responding to the direct cases may be filed no later than 28 days after the release of this Order, and must be

²⁵ See *Showtime Networks, Inc. et. al. v. FCC*, 932 F.2d 1 (D.C. Cir. 1991); *RCA American Communications, Inc. v. F.C.C.*, Case Nos. 811558 and 81-1597 (unpublished Judgement and Memorandum issued on July 21, 1982) (*Memorandum*); *RCA American Communications, Inc.*, 86 FCC 2d 1197 (1981) (*1981 Order*); Memorandum Opinion and Order, 94 FCC 2d 1338 (1983) (*Response to Remand Order*); Memorandum Opinion and Order, Mimeo No. 6153 (Com.Car.Bur. Released August 6, 1985) (*Investigation Order*); Memorandum Opinion and Order, 2 FCC Rcd 2363 (1987) (*Final Order*); AT&T Communications, Revisions to Tariff F.C.C. No. 2, Transmittal Nos. 2404 and 2535, 5 FCC Rcd 6777 (Oct. 31, 1990); Competition in the Interstate Interexchange Marketplace, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 4562 at 4573-74 (Feb. 17, 1995) (*Interexchange Reconsideration Order*).

²⁶ Contract Tariff No. 374. Transmittal No. CT 2952 at Section 4.

²⁷ *Id.* at Section 5.B.1.

²⁸ See Section 204(a) of the Communications Act, 47 U.S.C. § 204(a).

captioned "Opposition to Direct Case" or "Comments on Direct Case." The parties may each file a "Rebuttal" to oppositions or comments no later than 35 days after the release of this Order.

10. An original and four copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the Commission's commercial copying firm, International Transcription Service, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Also, one copy of each pleading must be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Such comments must specify the docket number of this investigation.

11. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

B. Ex Parte Requirements

12. *Ex parte* contacts (*i.e.*, written or oral communications which address the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding during the time periods established by the Commission's rules. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.1200 *et seq.*


C. Paperwork Reduction Act

13. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A). The request for information contained herein is not subject to the clearance procedures of 44 U.S.C. § 3507.

V. ORDERING CLAUSES

14. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 204(a), AT&T Corporation SHALL RESPOND to the issues designated in this Order Designating Issues for Investigation, no later than 14 days from the release of this order. Interested parties may file pleadings responding to the direct cases no later than 28 days from the release of the order and AT&T Communications may file a rebuttal no later than 35 days after the release of the order.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Kathleen M.H. Wallman", written in a cursive style.

Kathleen M.H. Wallman
Chief, Common Carrier Bureau